

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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IN RE WESTERN STATES WHOLESALE
NATURAL GAS ANTITRUST
LITIGATION,

MDL Docket No. 1566

Base Case No. 2:03-cv-01431-RCJ-PAL

THIS DOCUMENT RELATES TO:
ALL ACTIONS

ORDER

(Jt Mot to Compel – ECF No. 2789)
(Mot File Surreply – ECF No. 2813)

Before the Court is Defendants' Joint Motion to Compel Production of Documents Plaintiffs' Expert George Donkin Relied Upon (ECF No. 2789). The court has considered the motion, the Response in Opposition (ECF No. 2800), Defendants' Joint Reply (ECF No. 2810), Plaintiffs' Motion for Leave to File Surreply (ECF No. 2813), and Defendants' Joint Opposition to Plaintiff's Motion for Leave to File Surreply (ECF No. 2820).

BACKGROUND

This is a 14-year-old consolidated multidistrict antitrust litigation arising out of the sale of natural gas between January 1, 2000 and October 31, 2002. Plaintiffs and putative class members in these cases are commercial and industrial end users and retail purchasers of natural gas. Plaintiffs claim that during the relevant time period, the defendants engaged in a pervasive and widespread scheme to violate the antitrust laws of their individual states by entering into unlawful arrangements, contracts, agreements, and conspiring or colluding to manipulate the market price of natural gas. Plaintiffs allege that the contract prices they paid to their natural gas suppliers were either explicitly tied to, or impacted by, the price indices published by natural gas reporting firms such as *Gas Daily*, *Natural Gas Intelligence*, and *Inside FERC Gas Market Report*. Plaintiffs contend the defendants provided false, misleading or inaccurate information to the gas reporting firms which affected the market prices of natural gas. Additionally, defendants engaged in wash trades and other trading practices which significantly increased the market price of natural gas.

1 The court has resolved scores of discovery disputes throughout the course of this litigation.
2 The parties' current dispute involves materials provided to plaintiffs' retained expert, George
3 Donkin. Mr. Donkin prepared reports dated April 13, 2016, and September 6, 2016, which
4 describe and list the materials and evidence he considered in rendering his expert opinions. *See*
5 Donkin Reports, Mot. Ex. 2 (ECF No. 2789-2). Among the three pages of materials he described
6 that he considered in rendering his opinions is an entry for "evidence notebooks prepared by the
7 Plaintiffs' counsel relating to issues in this case." Mr. Donkin was deposed on October 11, 2016,
8 and was asked what he reviewed in formulating his opinions. *See* Donkin Depo., Mot. Ex. 3 (ECF
9 No. 2789-3). Mr. Donkin testified he relied on the materials in the evidence notebooks.¹ Counsel
10 for defendants therefore requested that the notebooks be produced at Mr. Donkin's deposition and
11 in subsequent efforts to resolve this dispute without court intervention. Plaintiffs' counsel refused
12 prompting the current motion to compel in which defendants seek an order compelling plaintiffs
13 to produce the content of the evidence notebooks pursuant to Rule 26 of the Federal Rules of Civil
14 Procedure.²

15 The motion argues that Rule 26(a)(2)(B)(ii) requires the production of the evidence
16 notebooks because they constitute the facts or data considered by the expert in forming his
17 opinions. Additionally, Rule 26(b)(4)(C)(iii) requires a party to produce all communications
18 between a party's attorney and a testifying expert witness regarding "assumptions that the party's
19 attorney provided and that the expert relied on in forming the opinions to be expressed." The
20 motion to compel relies on the Ninth Circuit's decision in *Republic of Ecuador v. Mackay*, 742
21 F.3d 860 (9th Cir. 2014). There the Ninth Circuit held that Rule 26(b)(4)'s protections for
22 attorney-expert communications do not prevent discovery about the opinions to be offered by the
23 expert, or the development, foundation, or basis of those opinions. Mr. Donkin unequivocally
24 testified he relied on the materials in the notebooks in formulating his opinions. Thus, even if the
25 materials would otherwise qualify as work product, they must be produced.

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¹ "Q. Did you rely on those materials? A. Yes." Donkin Deposition, Exhibit 3 to defendants' Motion to
28 Compel at 13:1-2.

² Any reference to a "Rule" or the "Rules" in this Order refer to the Federal Rules of Civil Procedure.

1 Plaintiffs oppose the motion arguing they have met the requirements of Rule 26 by
2 identifying all facts and data on which the expert relied. After the motion to compel was filed,
3 plaintiffs gave defendants a list of the files and documents “represented in the notebooks.” All of
4 the materials in the notebooks were either previously produced in discovery or are otherwise
5 readily available to the defendants. Plaintiffs contend that nothing more is required under Rule
6 26(a)(2)(B). Plaintiffs also argue the notebooks contain attorney opinion work product.
7 Specifically, the notebooks contain content summaries and energy industry meeting spreadsheets
8 that contain the mental impressions of plaintiffs’ counsel concerning the relevance or potential
9 relevance of those facts and data in the notebooks. Plaintiffs also argue that the organization and
10 the distillation of the contents of the notebooks including counsel’s excerpts of documents and
11 markings on the documents contain counsel’s mental impressions concerning case theories and the
12 relevance of certain facts and data. These materials are opinion work product and therefore non-
13 discoverable. Plaintiffs are willing to submit the summaries and spreadsheets or notebooks to the
14 court if requested.

15 Plaintiffs maintain that Rule 26(b)(4)(C) does not require them to produce counsel’s
16 opinion work product where (1) the facts and data on which the plaintiffs’ experts relied have been
17 disclosed, (2) the notebooks’ content reveal counsel’s mental impressions and theories, and (3) the
18 defendants have not made any showing of substantial need, or that the substantial equivalent
19 cannot be obtained without undue hardship. The 2010 Amendments to Rule 26(b)(4)(C) protect
20 communications between a party’s attorney and the party’s retained expert except to the extent
21 that they relate to expert compensation, or “identify facts or data that the party’s attorney provided
22 and that the expert considered in forming the opinions to be expressed; or identify assumptions
23 that the party’s attorney provided and that the expert relied on in forming the opinions to be
24 expressed.” Defendants are entitled to discover the facts and data considered by Mr. Donkin in
25 forming his opinions, but are not entitled to the mental impressions of plaintiffs’ counsel
26 concerning the importance, significance and counsel’s opinions about the facts and data provided
27 to Mr. Donkin. Defendants are also not entitled to know the attorneys’ choice and arrangement of
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1 documents in the notebooks because the selection and compilation reveals counsels' thought
2 processes and theories regarding the litigation, and is therefore protected opinion work product.

3 Plaintiffs contend that where aspects of the documents are protected from disclosure under
4 Rule 26(b)(4)(C) and cannot be segregated from arguably unprotected portions, discovery of the
5 work product protected materials may be compelled only in limited circumstances with a court
6 order when the party seeking this discovery has shown a substantial need for the discovery and the
7 substantial equivalent cannot be obtained without undue hardship. Defendants have made no such
8 showing. Plaintiffs produced a list of the notebooks' contents and the defendants possess or have
9 the ability to access "all non-Summary or Spreadsheet contents." Because defendants' motion to
10 compel seeks disclosure of information that is not required to be produced under Rule 26(a)(2)(B)
11 that constitutes opinion work product subject to nearly absolute protection, and defendants have
12 not shown substantial need or undue hardship, the motion should be denied.

13 Defendants reply that plaintiffs' opposition centers on irrelevant issues. Defendants
14 characterize this as a straightforward and easy issue for the court to resolve. Mr. Donkin testified
15 he relied on the contents of the evidence notebooks and plaintiffs' opposition does not dispute this.
16 His report indicates he relied on these materials. He also testified he relied on these materials, and
17 his billing timesheets show he spent in excess of 200 hours reviewing the evidence notebooks.
18 Copies of his timesheets are attached to the reply. *See* Reply Ex. 1 (ECF No. 2810-1), Donkin
19 Billing Statements.

20 Defense counsel requested production of the evidence notebooks at the conclusion of Mr.
21 Donkin's deposition. Excerpts of the parties' exchanges are attached to the motion. *See* Mot. Ex.
22 4 (ECF No. 2789-4), Dec. 6, 2016 Letter; Mot. Ex. 5 (ECF No. 2789-5), Jan. 17, 2017 Email
23 Exchange. At Mr. Donkin's deposition, counsel for plaintiffs denied on the record that the
24 evidence notebooks contained documents counsel prepared. Plaintiffs' counsel claimed that the
25 only thing in the notebooks that was work product was summaries of deposition testimony.
26 Subsequent communications among the parties to resolve this discovery dispute reaffirmed
27 plaintiffs' position that it was the way the evidence notebooks were constructed that constituted
28 work product. However, plaintiffs' opposition to this motion disclosed for the first time that the

1 evidence notebooks contain additional materials that counsel for plaintiffs prepared. Defendants
2 believe that the summaries and spreadsheet now claimed to be privileged essentially provided Mr.
3 Donkin with a “roadmap or template” for his opinions. The summaries and spreadsheet must be
4 produced because Donkin relied on them in forming his opinions and in his testimony.

5 Rule 26(b)(4)(C) requires production of materials the expert relied upon even if they might
6 constitute attorney work product. The cases cited by plaintiffs in their opposition do not involve
7 discovery disputes over documents provided to or relied upon in an expert and are thus irrelevant
8 to the issue before the court. Additionally, the reply points out that Judge Pro approved the
9 parties’ Stipulation and Proposed Order Regarding Protocol for Expert Witnesses (ECF No. 1117)
10 on June 9, 2008. *See Order* (ECF No. 1122). The first three paragraphs of the stipulation and
11 order identify attorney-expert communications that are not discoverable. The fourth paragraph,
12 however, states that the first three paragraphs “will not apply to any communication or documents
13 on which the experts intend to rely; such communications or documents will be subject to
14 discovery or inquiry at trials.”

15 Plaintiffs’ concede that the evidence notebooks contain facts and data. However, their
16 opposition to producing the notebooks leaves defendants in the position of guessing which facts
17 and data in the hundreds of documents consisting of over 10,000 pages were “excerpted” to provide
18 to Mr. Donkin to rely upon, and which were excluded from his consideration. Mr. Donkin relied
19 upon the documents in the form they were in the evidence notebooks, including the summaries
20 and the spreadsheet. Thus, plaintiffs’ list of the contents of the notebooks does not comply with
21 plaintiffs’ disclosure obligations. Defendants are not trying to discover drafts of Mr. Donkin’s
22 report, but are simply asking for the materials he testified he relied upon in the form they were in
23 when he relied upon them to form his opinions. Rule 26(b)(4)(C) authorizes discovery of materials
24 that experts rely on. The Ninth Circuit has affirmed that attorney-expert communications are
25 discoverable when the expert relied on the communications, and that Rule 26(b)(4)’s protections
26 for attorney-expert communications do not prevent discovery about the opinions to be offered by
27 the expert or the development, foundation, or basis for those opinions.

1 Finally, defendants argue that the substantial need standard does not apply to the mandatory
2 disclosures of materials relied upon by an expert in forming his or her opinions. Rather, the
3 substantial need standard applies to discovery of attorney-communications on subjects outside the
4 three exceptions in Rule 26(b)(4)(C).

5 Plaintiffs' filed a motion to file a surreply in opposition to defendants' joint motion to
6 compel which attached the proposed surreply, supporting declaration of Mr. Donkin and his expert
7 report. The motion argues the court should permit the surreply, because defendants' reply
8 incorrectly claims that plaintiffs agree that Mr. Donkin relied on all contents of the evidence
9 notebooks. Additionally, the reply raised the issue of the parties' stipulation (ECF No. 1117) to a
10 protocol for expert depositions for the first time. Plaintiffs claim the stipulation and order supports
11 their position because it provides a party need not produce any counsel-prepared materials on
12 which the expert relied. Mr. Donkin's declaration acknowledges that he testified at his deposition
13 that he relied on materials in the notebooks, and that he "did in fact rely on specific materials
14 provided." However, he avers that he only relied on the case documents and transcripts within the
15 evidence notebooks, and that he "did not rely on counsel's Summaries or the Spreadsheet" that
16 were in the binders. The surreply also represents that Mr. Donkin did not need to rely on the
17 counsel prepared spreadsheet of industry meetings or events because a similar spreadsheet was
18 marked, introduced and discussed at the deposition of Michele Markey, a former executive of one
19 of the trade publications.

20 Defendants filed a joint opposition to plaintiffs' motion for leave to file a surreply which
21 argues a surreply should not be permitted because it seeks to interject a nine paragraph self-serving
22 declaration of Mr. Donkin, and there are no new issues raised for the first time in defendants' reply
23 which justify a surreply. Defendants' entire motion to compel was premised on Mr. Donkin's
24 unequivocal testimony that he relied on the evidence notebooks. Plaintiffs' counsel represented
25 on the record that Mr. Donkin was sent excerpts from the depositions and that this was the only
26 thing plaintiffs claimed was work product within the binders. Defendants quote plaintiffs' counsel
27 during Mr. Donkin's deposition stating "every single piece of paper in there is something you have
28 seen." Defendants only learned for the first time when plaintiffs filed their opposition to the

1 motion to compel that additional materials were provided to Mr. Donkin. These are materials that
2 defendants have never seen. Plaintiffs should not be permitted to change their story and contradict
3 Mr. Donkin's deposition testimony. Finally, defendants cite LR 7-2(b) of the Local Rules of
4 Practice, stating that surreplies are discouraged.

5 **DISCUSSION**

6 **I. APPLICABLE LEGAL STANDARDS**

7 **A. The Work Product Doctrine**

8 The Supreme Court first recognized the work product doctrine in *Hickman v. Taylor*, 329
9 U.S. 495, 510–12 (1947). The work product doctrine is a “qualified privilege” that protects
10 “certain materials prepared by an attorney acting for his client in anticipation of litigation.” *United*
11 *States v. Nobles*, 422 U.S. 225, 237–38 (1975) (internal quotation omitted) (“At its core the work-
12 product doctrine shelters the mental processes of the attorney, providing a privileged area within
13 which he can analyze and prepare his client’s case.”). The work product doctrine is codified in
14 Rule 26(b)(3) and it protects “from discovery documents and tangible things prepared by a party
15 or his representative in anticipation of litigation.” *In re: Grand Jury Subpoena*, 357 F.3d 900, 906
16 (9th Cir. 2004), (citing *Admiral Ins. Co. v. United States District Court*, 881 F.2d 1486, 1494 (9th
17 Cir. 1989)). An adverse party may obtain documents protected by the work product privilege only
18 upon a showing of substantial need and undue hardship in obtaining the substantial equivalent of
19 the materials by other means. Fed. R. Civ. P. 26(b)(3).

20 **B. The Work Product Doctrine and Testifying Experts**

21 Multiple amendments to the expert witness disclosure requirements of Rule 26 have
22 addressed whether and to what extent materials provided to testifying experts are afforded work
23 product protection. In *Republic of Ecuador v. Mackay*, 742 F.3d 860 (9th Cir. 2014), the Ninth
24 Circuit joined the Tenth and Eleventh Circuits in holding that the 2010 Amendment to Rule 26
25 requires broad discovery of “facts and data” a testifying expert considers in rendering opinions,
26 but protects attorney opinion work product, *i.e.*, attorney mental impressions, conclusions,
27 opinions or legal theories. The Ninth Circuit addressed the historical evolution of Rule 26 in
28 deciding the scope of work product protection for trial preparation materials provided to a

1 testifying expert. It noted that the 1970 Amendment to Rule 26 added provisions “allowing for
2 discovery of information held by testifying experts and partially codifying the work product
3 doctrine.” *Id.* at 868. The primary reason for permitting discovery of testifying experts was to
4 allow opposing parties to prepare for effective cross-examination and rebuttal. *Id.*

5 The 1993 Amendment to Rule 26 added provisions requiring that most testifying experts
6 prepare reports and mandated the content of expert reports. *Id.* Expert reports were required to
7 disclose “data and other information” considered by the expert as well as exhibits and charts that
8 summarize or support the expert’s opinion. *Id.* Relying on Rule 26(a)(2)(B)’s “data or other
9 information” language, and the Advisory Committee note accompanying the 1993 Amendment,
10 the overwhelming majority of courts concluded that disclosure of any material given to an expert
11 by an attorney was required, including opinion work product. *Id.* at 869; *see also, e.g., Regional*
12 *Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 714 (6th Cir. 2006) (“[W]e now join the
13 overwhelming majority of courts . . . in holding that Rule 26 creates a bright-line rule mandating
14 disclosure of all documents, including attorney opinion work product given to testifying experts.”)
15 Following the 1993 amendment courts ordered draft expert reports produced in discovery, even if
16 they contained or could reveal opinion work product of attorneys. *See, e.g., Elm Grove Coal Co.*
17 *v. Director O.P.C.P.*, 480 F.3d 279, 301–03 (4th Cir. 2007). Courts also ordered the production
18 of communications between attorneys and testifying experts, even if the communications
19 contained opinion work product. *See, e.g., In re Pioneer Hi-Bred Int’l. Inc.*, 238 F.3d 1370, 1375
20 (Fed. Cir. 2001). As the Eleventh Circuit noted, these decisions broadly interpreting the “other
21 information” language in Rule 26(a)(2)(B) “undermined the protection of attorney opinion work-
22 product afforded in Rule 26(b)(3).” *Republic of Ecuador v. Hinchee*, 741 F.3d 1185, 1194 (11th
23 Cir. 2013).

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1 The majority view that all materials provided to an expert were required to be disclosed in
2 discovery led the American Bar Association (“ABA”) to adopt a resolution in 2006 urging rule
3 changes to preclude discovery of privileged materials exchanged between lawyers and experts.³
4 The ABA resolution recommended that until the rules were amended, lawyers should enter into
5 voluntary stipulations protecting draft reports and communications between attorneys and experts
6 which were related to an expert report. *Id.*

7 In 2008, the Advisory Committee proposed amendments to Rule 26 which were drafted to
8 narrow discovery of materials exchanged between an expert and counsel, and protect draft expert
9 reports. These proposed changes became effective December 1, 2010. The Advisory Committee
10 notes to the 2010 Amendment to Rule 26 commented that the decisions requiring disclosure of
11 expert reports and all communications between attorneys and testifying experts had resulted in
12 “undesirable effects.” Specifically, the decisions requiring disclosure had the undesirable effects
13 of raising the cost of litigation because attorneys were employing two sets of experts, “one for
14 purposes of consultation and another to testify at trial.” Fed. R. C.v. P. 26 Advisory Committee
15 notes (2010 Amendment). The decisions also caused attorneys to “adopt a guarded attitude toward
16 their interaction with testifying experts,” and caused experts to “adopt strategies that protect
17 against discovery but also interfere with their work.” *Id.*

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19 ³ On August 7-8, 2006, the ABA House of Delegates adopted the following resolution:

20 RESOLVED. That the American Bar Association recommends that applicable federal,
21 state and territorial rules and statutes governing civil procedure be amended or adopted to
22 protect from discovery draft expert reports and communications between an attorney and
23 a testifying expert relating to an expert’s report, as follows: (i) an expert’s draft report
24 should not be required to be produced to an opposing party; (ii) communications, including
25 notes reflecting communications, between an expert and the attorney who has retained the
26 expert should not be discoverable except on a showing of exceptional circumstances; (iii)
nothing in the preceding paragraph should preclude opposing counsel from obtaining any
facts or data the expert is relying on in forming his or her opinion, including that coming
from counsel, or from otherwise inquiring fully of an expert into what facts or data the
expert considered, whether the expert considered alternative approaches into the validity
of the expert’s opinions.

27 FURTHER RESOLVED. That the American Bar Association recommends that, until
28 federal, state and territorial rule and statutory amendments are adopted, counsel should
enter voluntary stipulations protecting from discovery draft expert reports and
communications between attorney and expert relating to an expert’s report.

1 The 2010 Amendment to Rule 26 changed the Rule 26(b)(2)(B) disclosure requirements
2 from “data or other information” considered by the expert witness to require disclosure of “facts
3 or data.” The Committee Notes make it clear that the amendment was intended to limit disclosure
4 of the mental impressions of counsel. The phrase “or other information” was deleted because it
5 had been relied upon by a majority of courts which had taken a bright-line approach mandating
6 disclosure of all documents, including attorney opinion work product given to testifying experts.
7 This change was made to “alter the outcome in cases that have relied on the 1993 formulation
8 requiring disclosure of all attorney-expert communications and draft reports.” Fed. R. Civ. P.
9 26(a)(2)(B) Advisory Committee Notes (2010 Amendment). As the drafters explained: “The
10 refocus of disclosure on ‘facts and data’ is meant to limit disclosure to material of a factual nature
11 by excluding theories or mental impressions of counsel.” *Id.*

12 The 2010 Amendment to Rule 26(b)(4) added Rule 26(b)(4)(B) to extend explicit
13 protection to draft reports. It also amended Rule 26(b)(4)(C) to provide work product protection
14 to communications between the party’s counsel and testifying experts with three exceptions. The
15 three exceptions are attorney-expert communications, regardless of form, that: (1) “relate to
16 compensation for the expert’s study or testimony;” (2) identify facts or data that the party’s
17 attorney provided and that the expert considered in forming the opinions to be expressed;” and (3)
18 “identify assumptions that the party’s attorney provided and that the expert relied on in forming
19 the opinions to be expressed.” Fed. R. Civ. P. 26(b)(4)(C)(i)–(iii).

20 In *Mackay*, the Ninth Circuit examined both the text of Rule 26 and the Advisory
21 Committee Notes in reaching its conclusion that the 2010 Amendments to Rule 26 should “be
22 interpreted broadly” to require disclosure of “any material considered by the expert, from whatever
23 source, that contains factual ingredients.” 742 F.3d at 869. The court found that “Rule 26(b)(3)
24 does not provide presumptive protection for all testifying expert materials as trial preparation
25 materials.” *Id.* at 871. However, the court concluded the 2010 Amendment extended work product
26 protection to core or opinion work product, that is, an attorney’s mental impressions, conclusions,
27 opinions, or legal theories developed in anticipation of litigation. *Id.* at 869. “The historical
28 evolution of the rule, its current structure, and the Committee’s explanatory notes make it clear

1 that the driving purpose of the 2010 Amendment was to protect opinion work product—*i.e.*,
2 attorney mental impressions, conclusions, opinions or legal theories—from discovery.” *Id.* at 870.

3 The *Mackay* decision is consistent with the Tenth Circuit’s holding in *Republic of Ecuador*
4 *v. For the Issuance of a Subpoena (Bjorkman)*, 735 F.3d 1179 (10th Cir. 2013). There, the Tenth
5 Circuit held that “the underlying purpose of the 2010 revision was to return the work-product
6 doctrine to its traditional understanding” by requiring disclosure of “facts and data” and by
7 “excluding theories or mental impressions of counsel.” *Id.* at 1187. The Eleventh Circuit reached
8 the same conclusion in *Republic of Ecuador v. Hinshee*, 741 F.3d 1185 (11th Cir. 2013), holding
9 “the 2010 Amendment to Rule 26(a)(2)(B) was intended to protect the opinion work-product of
10 attorneys in the context of expert discovery,” while at the same time interpreting “facts or data”
11 broadly. *Id.* at 1195. As the Eleventh Circuit explained, “in other words, the term ‘facts or data’
12 includes all materials considered by the testifying expert *except the core opinion work product of*
13 *attorneys.*” *Id.* (emphasis added).

14 By providing protection for draft reports and attorney-expert communications, Rule
15 26(b)(4) does not prevent discovery “about the opinions to be offered by the expert or the
16 development, foundation or basis of those opinions.” *Mackay*, 742 F.3d at 870, citing Advisory
17 Committee notes to 2010 Amendment of Rule 26(b)(4). Although the scope of the permissible
18 disclosures and discovery under Rule 26(b)(4) remains broad, “discussions with counsel about the
19 ‘potential relevance of facts or data’ and more general discussions ‘about hypotheticals, or
20 exploring possibilities based on hypothetical facts’ are protected.” *Id.* at 870 (citing Fed. R. Civ.
21 P. 26(a)(2)(B) Advisory Committee notes to the 2010 Amendment). Thus, *Mackay* held that after
22 the 2010 Amendment, “materials containing ‘factual ingredients’ are discoverable, while opinion
23 work product is not discoverable.” *Id.*

24 **II. Analysis and Decision**

25 The parties’ current dispute requires the court to determine whether the summaries,
26 spreadsheet and documents marked or annotated by counsel provided to Mr. Donkin are “facts and
27 data” and/or assumptions plaintiffs’ counsel provided that he considered and/or relied on in
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1 reaching his opinions or opinion work product containing attorney mental impressions,
2 conclusions, opinions or legal theories. The former is discoverable. The latter is not.

3 As an initial matter, neither side explicitly addresses whether the 2010 Amendment to Rule
4 26 applies to this consolidated litigation which was initiated in 2003. The defendants implicitly
5 make this argument by relying heavily on the Ninth Circuit's decision in *Mackay* which applied
6 the 2010 Amendment in holding opinion work product provided to a testifying expert was
7 protected from disclosure in discovery. Plaintiffs do not address this issue at all.

8 Rule 86 governs the effective date of the federal rules and any amendments. It provides:

9 (a) **In General.** These rules and any amendments take effect at the time specified
10 by the Supreme Court, subject to 28 U.S.C. § 2074. They govern:

11 (1) proceedings in an action commenced after their effective date; and

12 (2) proceedings after the date in an action then pending unless:

13 A. the Supreme Court specifies otherwise; or

14 B. the court determines that applying them in a particular action
15 would be infeasible or work an injustice.

16 The court finds that applying the 2010 amended version of Rule 26 to this case would
17 neither be "infeasible or work an injustice." The expert reports were disclosed years after the 2010
18 Amendment became effective. Additionally, the district judge approved the parties' stipulation
19 (ECF No. 1117) regarding expert witness protocol on June 9, 2008. *See Order* (ECF No. 1122).
20 By entering into the stipulation the parties appear to have heeded the ABA's 2006 resolution and
21 recommendation that until Rule 26 was amended, "counsel should enter into voluntary stipulations
22 protecting from discovery draft expert reports and communications between attorney and expert
23 relating to an expert's report."

24 The court notes the plaintiffs' description of the contents of the evidence notebooks has
25 evolved over time. At Mr. Donkin's deposition, counsel for plaintiffs agreed to provide the
26 defendants with "everything that went in, all the deposition testimony" in the evidence notebooks.
27 *See Mot. Ex. 3* (ECF No. 2789-3), Donkin Depo. at 261:18–20. However, plaintiffs' counsel
28 stated she was "not going to provide my work product." *Id.* at 262:1–2. When defense counsel
asked whether there was content in the evidence notebooks other than depositions or an affidavit,
plaintiffs' counsel responded "sure there is." *Id.* at 262:9–13. Counsel for plaintiffs was then

1 specifically asked whether there were documents in the notebooks “that you guys prepared?” *Id.*
2 at 262:14–15. Plaintiffs’ counsel responded:

3 No. All we did, instead of sending him every deposition in its entirety, we sent him
4 some excerpts from depositions. That’s the only thing that is our work product.

5 We went through depositions and rather than sending 800,000 pages of deposition
6 testimony, we sent notebooks of that excerpted depositions and told him anytime
7 he wanted to see a complete deposition let us know. We did ask for complete
depositions, all that kind of stuff. But the work product part of that is not anything
you haven’t seen. Every single piece of paper in there is something you have seen,
but in some cases we went through and excerpted depositions rather than providing
this kind of a thing.

8 *Id.* at 262:16–263:6. After the deposition defense counsel requested that plaintiffs produce the
9 notebooks. *See* Mot. Ex. 4 (ECF No. 2789-4), Dec. 6, 2016 Letter. Plaintiffs’ counsel responded
10 that the evidence notebooks “are our work product. The way we put them together clearly
11 incorporates our work product and mental impressions of the case... we have provided you with
12 the identification of this material in our answers to your contention interrogatories...since you
13 have the information anyway there is no hardship and we will not agree to their production.” Mot.
14 Ex. 5 (ECF No. 2789-5), Jan. 17, 2017 Email Exchange.

15 Plaintiffs’ opposition to the motion to compel, however, argues that the notebooks contain
16 attorney opinion work in the form of content summaries and an energy industry meeting
17 spreadsheet. Plaintiffs allege that the summaries contain plaintiffs’ counsels’ mental impressions
18 concerning the relevance, or potential relevance of the facts and data contained in the notebooks
19 and that the spreadsheets also contain counsel’s mental impressions concerning the relevance or
20 potential relevance of energy-industry meeting facts and data. The opposition also asserts that the
21 organization and distillation of the notebooks’ contents includes counsels’ excerpts of documents,
22 markings and comments on documents, and therefore contain plaintiffs’ counsel’s mental
23 impressions concerning case theories and the relevance of certain facts and data.

24 Contrary to the representations made during the Donkin deposition, plaintiffs now claim
25 work product protection for three categories of materials: (1) content summaries; (2) spreadsheets
26 concerning an energy industry meeting; and (3) counsels’ excerpts of documents and markings on
27 documents which contain plaintiffs’ counsels’ mental impressions concerning case theories and
28 relevance of certain facts and data within the notebooks.

1 Defendants seek an order compelling plaintiffs to produce all of the notebooks in the form
2 in which they were provided to Mr. Donkin because he testified he relied on the notebooks in
3 reaching his opinions. After this motion was filed, the plaintiffs provided defendants with a
4 detailed alphabetized inventory of the notebooks' content with the Bates numbers of all documents
5 produced in discovery in this case, and list of depositions by the name of the deponent and the date
6 the deposition was taken. The content list also identifies documents readily available in the public
7 domain such as press releases, pleadings, and regulatory proceeding orders, consent decrees and
8 judgements. The court finds that defendants are not entitled to the notebooks in the form in which
9 they were provided to and reviewed by Mr. Donkin. The court agrees with those courts that have
10 held that opposing counsel is not entitled to materials as organized by plaintiffs' counsel. *See*,
11 *e.g.*, *Spork v. Peil*, 759 F.2d 312, 318 (3rd Cir. 1985); Charles Alan Wright & Arthur R. Miller,
12 *Federal Practice and Procedure* § 2016.5 (3rd ed.) (stating "where the documents reviewed by
13 the witness have already been produced, there is no justification for requiring revelation by counsel
14 of the exact identity or sequence of materials actually reviewed").

15 Defendants also seek an order compelling plaintiffs to provide the summaries and
16 spreadsheets counsel prepared and provided to Mr. Donkin. Defendants emphasize that they only
17 learned what other materials plaintiffs claim are work product protected by reading plaintiffs'
18 opposition. Defendants claim the summaries, spreadsheet, and documents with markings and
19 comments of plaintiffs' counsel in the notebooks must be produced because they are either facts
20 or data, or assumptions plaintiffs' counsel provided that Mr. Donkin relied upon in reaching his
21 opinions. Plaintiffs claim Mr. Donkin reviewed the notebooks in their entirety, and despite
22 testifying in general terms that he "relied on" the content of the notebooks, he did not rely on any
23 counsel-prepared documents in the binders. Plaintiffs' proposed surreply argues that the parties
24 "appear to agree that Defendants are only entitled to the materials on which Mr. Donkin actually
25 relied in formulating his opinions" and offers Mr. Donkin's declaration in support of this argument.
26 Mr. Donkin's declaration attests that he relied on "case documents and audio file transcripts
27 contained in the Notebooks," but "did not rely on Counsels' Summaries or the Spreadsheets."

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1 Surreplies are disfavored for the obvious reason that they are most often an improper
2 attempt to get in the last word, and generate another round of briefing. Plaintiffs' opposition could
3 have and should have addressed the arguments raised in the proposed surreply that Mr. Donkin
4 did not rely on opinion work product in the notebooks. However, defendants' reply raised the
5 issue of the effect of the parties' stipulated expert protocol for the first time. The court will
6 therefore reluctantly grant the motion to file a surreply.

7 Having reviewed and carefully considered the moving and responsive papers and
8 supporting declarations and exhibits, the court will deny defendants' motion to compel plaintiffs
9 to produce opinion work product in the evidence notebooks provided to Mr. Donkin. Mr. Donkin's
10 report lists the "evidence notebooks prepared by the Plaintiffs' counsel relating to issues in this
11 case" in a three-page list of "materials and evidence he considered." A copy of the "content list"
12 is attached to plaintiffs' opposition. *See Opp'n Ex. 1-A* (ECF No. 2800-2), Decl. of Andrew J.
13 Ennis at Ex. A, Feb. 16, 2017 Email. The exhibit describes the content of the notebooks: "The
14 Donkin Notebooks are composed of excerpts, complete copies, marked copies, unmarked copies,
15 and/or transcripts of the following documents and files."

16 Mr. Donkin testified at his deposition that almost all of the material he considered in
17 reaching his opinions was received from counsel. He identified additional documents he reviewed
18 that he did not get from counsel such as back issues of *Natural Gas Week* to which his office
19 subscribes, and a 2007 CFTC report. Mr. Donkin was deposed at some length. Counsel for
20 defendants had every opportunity to develop the record to support their arguments that the Mr.
21 Donkin relied on opinion work product and/or assumptions provided by plaintiffs' counsel.
22 Excerpts of more than 260 pages of his deposition testimony are attached to the parties' moving
23 and responsive papers. The only testimony the defendants cite in support of their motion that Mr.
24 Donkin "relied upon" the materials in the notebooks appeared early in the deposition. Mr. Donkin
25 was asked, "Did you rely on those materials?" *See* Surreply Ex. 2 (ECF No. 2813-1), Donkin
26 Depo. at 13:1. He answered yes. *Id.* at 13:2. Defendants do not cite any other testimony
27 suggesting Mr. Donkin relied on any assumptions plaintiffs' counsel provided, or on any of the
28 mental impressions, analysis or theories of counsel contained in the notebooks.

1 Mr. Donkin's April 13, 2016 expert report exceeds 100 pages and cites extensively to
2 documents and testimony supporting his conclusions. *See* Mot. Ex. 2 (ECF No. 2789-2). The
3 court finds that Mr. Donkin's answer to a single question that he "relied on" materials provided to
4 him in the evidence notebooks is insufficient to overcome work-product protection for core or
5 opinion work product of plaintiffs' counsel. Plaintiffs have provided a complete list of the entire
6 content of the evidence notebooks. Defense counsel had an opportunity to inquire at Mr. Donkin's
7 deposition whether his report and opinions relied on any assumptions provided by plaintiffs'
8 counsel. Mr. Donkin clearly relied on the facts and data in the notebook as well as a few other
9 materials he reviewed on his own, which he identified at his deposition. However, nothing in the
10 record supports a finding that Mr. Donkin relied on the mental impressions, conclusions, and
11 theories of counsel or on assumptions provided by counsel in reaching his opinions.

12 Finally, the parties entered into a stipulation (ECF No. 1117) regarding expert witnesses,
13 which the district judge approved June 9, 2008. *See Order* (ECF No. 1122). The stipulation did
14 not explicitly address opinion work product. It provides that (1) communications between counsel
15 and experts, (2) communications between experts and third parties or clients, and (3) notes, drafts
16 or other types of preliminary work by or for experts will not “be the subject to discovery or inquiry
17 at trials.” *Id.* at 1–2, ¶¶ 1–3. It then states that the first three paragraphs “will not apply to any
18 communications or documents on which the experts intend to rely; such communications or
19 documents will be subject to discovery or inquiry at trial.” *Id.* at 2, ¶ 4. The Ninth, Tenth and
20 Eleventh Circuits have now held that the 2010 Amendment to Rule 26 requires broad disclosure
21 of facts and data an expert considers but protects opinion work product. As the Ninth Circuit
22 articulated in *Mackay*, “materials containing ‘factual ingredients’ are discoverable, while opinion
23 work product is not discoverable.” 742 F.3d at 870. The plaintiffs and Mr. Donkin have disclosed
24 the facts and data on which he relied.

25 For the reasons explained,

IT IS ORDERED:

27 1. Defendants' Joint Motion to Compel Production of Documents Plaintiffs' Expert
28 George Donkin Relied Upon (ECF No. 2789) is **DENIED**.

1 2. Plaintiffs' Motion for Leave to File Surreply (ECF No. 2813) is **GRANTED**.

2 Dated this 12th day of July, 2017.

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4 PEGGY A. TEER
5 UNITED STATES MAGISTRATE JUDGE

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